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# THE NEED FOR PRO BONO PROGRAMS IN ALBERTA

Bradley V. Odsen\*

## I. BACKGROUND

### PRO BONO DEFINED

Pro bono publico is, at its most basic, service to the public without charge. No one would deny that that's what pro bono is, but, as it pertains to the legal profession, there is considerable difference of opinion as to just what that entails or, to put it another way, which of a lawyer's activities might properly be classified as pro bono in nature. These differences of opinion as to the range of activities which might properly be characterized as pro bono arise to a considerable extent out of differences of opinion concerning the reasons behind the development of pro bono within the legal profession.<sup>1</sup> Since any decisions concerning the appropriate mechanism for the delivery of pro bono services must, of necessity, be based on a fundamental understanding of, and agreement as to the nature of, pro bono, an examination of these issues is useful at this point.

The following quotations indicate, in some degree, the variety of opinion:

"There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of public ser-

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\* Copyright © 1985, Bradley V. Odsen. Mr. Odsen is the past Executive Director of Calgary Legal Guidance, and is currently a student-at-law with David Anderson in Cochrane, Alberta. This article reprints edited excerpts from a report prepared for the Law Society of Alberta by Mr. Odsen.

1 Is pro bono service a tradition, or an obligation, or a traditional obligation? Where does the pro bono notion come from, and what are the practical implications of its origin? Many well known and much respected legal scholars and practitioners have, over the years, addressed these issues with little consensus of opinion. As might be expected from the work of such great minds, the arguments advanced in support of differing, and very often opposite, conclusions are very powerful and very persuasive.

vice - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."<sup>2</sup>

"First, a profession is an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill.

Second, it is an occupation which is pursued largely for others and not merely for oneself.

Third, it is an occupation in which the amount of financial return is not the accepted measure of success."<sup>3</sup>

"The protection of the law is a right that every citizen should enjoy. The protection of the law is secured by just laws, fairly administered, with the aid when necessary of legal advice and assistance. Assuring that legal assistance is available to those who need it is a professional obligation that every lawyer shares."<sup>4</sup>

"It is in keeping with the best traditions of the legal profession to reduce or waive a fee in a situation where there is hardship or poverty, or the client or prospective client would otherwise effectively be deprived of legal advice or representation."<sup>5</sup>

"The public has granted a business monopoly to lawyers to provide basic legal services; it even has granted lawyers the right to define what kinds of activities will be included in the legal services monopoly. In return for this monopoly, the Bar has agreed to make quality legal services available to everyone, not just those who can pay the going price. Canon 2 of the American Bar Association's Code of Professional Responsibility requires every lawyer

2 Roscoe Pound, quoted in, Raymond, Marks, F. et. al., *The Lawyer, the Public, and Professional Responsibility* (1972) at 11 fn.

3 Mr. Justice Louis Brandeis *Ibid.* at 30fn.

4 The Consortium on Legal Services and the Public, *Legal Services for the Average Citizen, A Discussion Paper*, (American Bar Association, 1977) at 1.

5 The Canadian Bar Association, *Code of Professional Conduct*, (1974) Chapter 10, Commentary number 2, pages 39 and 40.

to assist the legal profession in fulfilling its duty to make legal counsel fully available. Thus the business of the Bar, the reason the public continues to grant it a monopoly, is to see that everyone - including the poor and other unrepresented or under-represented people and groups - has access to quality legal services....

Offering legal services for everyone - rich and poor alike - is the quid pro quo for the public's grant of a business monopoly; insuring that free services for the poor and others are available is a business duty, not a public service activity. Alleged past failure to offer services to all is one reason why some members of the public are challenging the Bar's monopoly."<sup>6</sup>

As can readily be seen, the view taken of the nature of the pro bono obligation of the profession necessarily contains within it the definition of what activities may be appropriately characterized as such. That this is so, is perhaps best illustrated by the following quotation:

"It is true that at the present time the lawyer does not hold that position with the people that he held 75 or indeed 50 years ago; but the reason is not lack of opportunity. It is this: instead of holding a position of independence between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people. We hear much of the "corporation lawyer", and far too little of the "people's lawyer". The great opportunity of the .... Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people ....

For nearly a generation the leaders of the Bar with few exceptions have not only failed to take part in any constructive legislation designed to solve in the interest of the people our great social, economic and industrial problems, they have failed likewise to oppose legislation prompted by selfish interests. They have often gone further in disregard of public interest. They have at times advocated, as

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6 Petrie, Roderick N., *The Public Service Responsibility of the Bar*, contained in *Commitment to Public Interest Law*, at 2 and 3.

lawyers, measures which as citizens they could not approve....they have erroneously assumed that the rule of ethics to be applied to a lawyer's advocacy is the same where he acts for private interests against the public as it is in litigation between private individuals."<sup>7</sup>

Most lawyers agree that pro bono service is in the best traditions of the legal profession. Where they differ is: first, whether pro bono activity is simply laudable or is obligatory; and second, is with respect to the type of activity that constitutes this service. Many lawyers feel that any involvement in community activity is, by virtue of their membership in the legal profession, a pro bono contribution to society. On the other hand, many other lawyers feel that only that activity which bears directly on the legal services that can be provided by them, fulfills this obligation. One commentator who clearly illustrates this difference is Roderick N. Petrie, Past Chairman of the American Bar Association Standing Committee on Specialization:

"But every activity which requires the lawyer to contribute money or to volunteer time (and, consequently, to lose the chance to work for a paying client during the same time) is not part of the public service responsibility of lawyers. Free or low cost legal services for the poor, or for the local symphony or art museum, are part of the business duty of the Bar to offer quality services to all. And membership by a lawyer on the symphony's Board of Trustees - even when he is not there to provide free legal counsel - is not part of a lawyer's public service responsibility. It may help fulfill the lawyer/Board member's responsibilities as an active and involved citizen of his community, but it does not help fulfill his public service responsibilities as a lawyer to improve the administration of justice. A good symphony orchestra is a wonderful thing, but it doesn't have anything to do with the administration of justice."<sup>8</sup>

Before moving from this admittedly philosophical discussion of pro bono publico, it will be useful to examine very briefly, the potential implica-

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7 Mr. Justice Louis Brandeis, *id.* at 28 and 29. These words were written in 1914, as a response to the alarm that Mr. Justice Brandeis felt arising from his perception of trends in the legal profession. There are many who would argue that these words are just as true today as they were 70 years ago, perhaps even more so. And further, that this is particularly true in Canada.

8 Petrie, Roderick N., *Commitment to Public Interest Law*, *ibid.* at 6. Mr. Petrie,

tions arising from the *Canadian Charter of Rights and Freedoms* alluded to earlier. Specifically, attention should be paid to the possible ramifications of section 15(1).<sup>9</sup>

The Honourable Mr. Roland Penner, Attorney General of Manitoba, in a recent speech<sup>10</sup> alluded to this very issue. It is that Honourable Gentleman's opinion that in addition to whatever else it may mean, that section certainly must mean that it is the right of every citizen to have access to the law. Similarly, the Honourable Mr. Brian Dickson, Chief Justice of Canada, in a speech delivered to the Canadian Bar Association, Alberta Branch, at the 1985 Mid-Winter Meeting expressed the view that the Supreme Court of Canada would be particularly interested in dealing with questions relating to access to the justice system. There can be little doubt of the impact this is likely to have on government but, it is respectfully suggested the ramifications for the legal profession are equally if not more profound. Hence, the profession is well advised to "have it's house in order" when this issue arises - as it most surely will.

In conclusion, and by way of demonstration, it is useful to once again look to the experience of the profession in the United States. There, the American Bar Association has in its Model Rules of Professional Conduct (which are like the Canadian Bar Association Code of Professional Conduct, and hence not binding on state associations), included what is referred to as a "mandatory pro bono service" provision:

"A lawyer shall render unpaid public interest legal service. A lawyer may discharge this responsibility by service in activities for improving the law, the legal system, or the legal profession, or by providing professional services to persons of limited means or to public service groups or organ-

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of course, argues from the point of view that the pro bono obligation of the profession is a strictly business obligation. This is illuminating, because it helps to illustrate that no matter what premises most of today's scholars adopt as the starting point for their examination of pro bono, they all reach the same conclusion: that is, that any pro bono activity, to qualify as such, must consist, at least in some part, of actual legal services rendered to the community.

9 "15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

10 R. Penner, Address (Conference of Public Legal Education Administrators, sponsored by the Canadian Law Information Council, Winnipeg, Manitoba, 6 March 1985).

izations. A lawyer shall make an annual report concerning such service to an appropriate regulatory authority."<sup>11</sup>

## POVERTY LAW

A necessary corollary of the decision to undertake pro bono activity, is that this is also a decision to provide service in that area of the law which has come to be known as poverty law. While this is an area which has as yet received little recognition as a subject within the law (as, for example, torts, contracts, tax), nonetheless scholars and practitioners who have, over the past two decades, worked with and for the economically disadvantaged, well recognize the unique set of legal problems experienced by this group. It is this commonality of experience which has given rise to the notion that the practice of poverty law is indeed a speciality. And while it is certainly not appropriate to enter into a lengthy discourse on that subject, it is considered advisable to review, in at least a cursory manner, some of the more salient issues.

The first notable aspect of poverty law is that it encompasses many elements of the more traditional forms of law. Thus, family law is important, particularly in relation to issues of maintenance and support (but rarely in relation to issues of distribution of matrimonial property); administrative law is important, eg. as relates to welfare and UIC disputes (but never, for example, as relates to boards and tribunals governing trade and commerce); contract law is important, particularly as relates to consumer transactions (but never as relates to business transactions); and so on.

The second aspect of poverty law which is immediately noteworthy, is that the individuals which comprise that group identified as "economically disadvantaged", are often readily identifiable by their membership in other demographically significant groups. For while it can be said that the poor represent, in some senses, a cross-section of society, the degree of representation by some groups is greater than that of others.

Thus it is that, when compared with the general population, the classification of "the poor" encompasses more women than men; more natives than non-natives; more poorly-educated than well-educated<sup>12</sup>; more re-

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11 Barlow F. Christianson, "The Lawyer's Pro Bono Publico Responsibility"(1981), 1 American Bar Foundation Research Journal, 1.

12 The demarcation point being arbitrarily selected being a high-school diplo-

cent immigrants than second-generation Canadians and beyond; more elderly<sup>13</sup>; and more handicapped, whether physically or mentally, than non-handicapped. Of course selected individuals may well fall within a number of these groups and, not surprisingly, the correlation between the number of these groups within which an individual might fall and that individual's economic status is statistically significant. Thus, to use an extreme example, the chances that an elderly, native woman, with little formal education and a physical disability, will also fall within the category of the "economically disadvantaged", are statistically significant indeed.

It is important to recognize this aspect of "poverty law" for, as every good lawyer well knows, the practice of law consists in dealing with people at least as much as it consists in dealing with the law. Indeed, many would argue that it is far more of the former than the latter. In any event, the lawyer purporting to offer his or her services to the poor must recognize that the individuals comprising this group bring with them special needs encompassing both the legal and the personal.<sup>14</sup> Few, it is suggested, would argue that a lawyer can meet the client's legal needs without some minimal understanding and appreciation of the personal needs giving rise to same. None, it is submitted, would be persuasive in that argument.

Implicit then, in the decision of a lawyer to undertake to provide pro bono services to the poor, is a decision to undertake, in whatever degree, the practice of poverty law. Equally so is a decision by the profession to recognize a pro bono obligation and to initiate pro bono activity, implicitly a decision to encourage the practice of poverty law.

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ma. Not surprisingly, the correlation between years of formal education of an individual and gross annual income is exceedingly high.

13 Individuals age 65 and over are normally, in statistical terms, classified as "the elderly".

14 It is wise, within this context, to reflect back on the provisions of Section 15 (1) of the *Charter of Rights and Freedoms*. Very clearly, the enumerated areas within which discrimination is prohibited are readily identifiable as areas having significant statistical impact on economic status. It is submitted that this fact gives credence to the proposition earlier advanced; that is, that there are clear and present implications with respect to access to the legal system contained within the *Charter of Rights and Freedoms*.



## AN EXAMINATION OF "NEED"

What are legal needs? Do they arise from the perceptions of individuals that they require the services of a lawyer, but are unable to obtain those services? Or do they refer to the existence of problems of a legal nature in which lawyers are not used and which are not being satisfactorily resolved with the help of non-legal resources? In other words, are "legal needs" defined by the alleged possessor of those needs, or by the supposed provider of services to fulfill those needs - are they defined by the public, or by lawyers? Since the purpose of this report is, in part, to examine "needs", the operational definition of "needs" as used in the report and the reasons underlying the choice of that definition must be explicated.

In addition to the definitional problems associated with the concept of "legal needs", there is also the problem of lack of statistical investigation into the matter. Whether the approach is to select a definition and then look for statistical research which addresses the issues thus raised, or to review the literature on statistical research that has been conducted in order to assess its applicability to any of the issues here in question, the end result is the same: there is not much Canadian data available, there is even less available which applies specifically to Alberta, and there is nothing which has been generated within the last five years. However, most organizations involved in the delivery of legal services, be they public or private, compile statistics which are intended to reflect the delivery provided. Most of this is for internal use only and therefore not readily available, and of that which is, the best that can be said of it is that careful analysis of the trends revealed therein may provide sufficient grounds for the advancement of hypotheses related to the issue in question.

For the purposes of this report, legal need will be taken to be demonstrated where individuals have perceived a need for the services of a lawyer, but have been unable to obtain those services for financial reasons (and failure to qualify under the Legal Aid Plan of Alberta). The reasons for this are two-fold: first, because this definition seems to fall most closely within the parameters indicated by the request giving rise to this report; and second, because statistical data related to the delivery of legal services in Alberta (and which has been made available), is only analysable within these terms. It is hoped however, that by drawing the issue of the definition of "legal needs" and the fact that there is a dearth of statistical investigation in this area, to the attention of the profession, the debate will be engendered and research initiatives under-

taken which can address these matters in a more fundamental and comprehensive manner.<sup>15</sup>

One final matter in respect to the legal needs of the poor merits consideration. That is, that there are undeniable policital implications both in the decision to undertake provision of legal services to the poor and in the decision as to the type of mechanism with which this will be accomplished. The most obvious of these is, of course, that relating to the role of government. Another, which is in some senses related to the first, is that of funding. A more fundamental one relates to the "political" status of the poor in our society, and more particularly, to the fact that the needs of the poor are very often in direct opposition to the needs of the "establishment". The issue of "political power" manifests itself within the legal regime when policy decisions are made concerning which kinds of cases will (and will not) receive coverage. Indeed, the very issue of who makes those policy decisions in the first place, is a political issue. These are not matters which are a proper concern of this report, but the existence of political issues is expressly acknowledged to avert any potential criticism of this report for failure to fully appreciate the political implications inherent in this area.

## II. THE NEED FOR PRO BONO SERVICES IN ALBERTA

### INTRODUCTION

Up to this point, the discussion has been mainly philosophical and to a certain degree methodological. What follows will be mainly informational in nature.

The procedure here is to canvass the spectrum of "providers of legal services" and, when such are available, to utilize internally generated statistics to illustrate the apparent unmet legal needs of the poor. At the conclusion of the chapter, the information provided will be used to test the hypothesis that: there is a significant segment of the population of

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15 For a particularly revealing discussion of the complexities of these issues, see Curran, Barbara A., et. al., *The Legal Needs of the Public: The Final Report of a National Survey* American Bar Association, (1977), and Curran et. al., *Final Report of the Special Committee to Survey Legal Needs* (American Bar Association, 1978).

Alberta who will, from time to time, require the services of a lawyer but who, due to financial constraints, and failure to qualify under the rules of the Legal Aid Plan of Alberta, are denied access to the services of a lawyer and therefore access to the legal system.

### **THE PRIVATE BAR IN ALBERTA**

While there is no statistical data available in this regard, it is widely acknowledged that most lawyers have as an element of their practice, the provision of legal services at reduced fee or no fee. It is probably fair to say that this most often occurs when the lawyer is providing legal services for relatives or friends. Where the client is not a relative or friend, it seems likely that the lawyer involved in a "small legal firm" is more apt to be concerned with the client's ability to pay than is the lawyer associated with a "large legal firm". Similarly, where the lawyer is practising in a rural setting, and might well be the only community source of legal services, a likelihood of the provision of services at a fee based on the client's financial constraints, would seem to be greater than in an urban setting.

Because of the current economic climate, many lawyers practicing in Alberta have incurred bad debts. It has been suggested that the provision of legal services for which some or all of the agreed upon fee is not collected, amounts to a pro bono contribution. Such a view, it is respectfully submitted, arises from a misapprehension of the nature of pro bono service. Clearly, whatever else it may be, pro bono service is not something that arises "after the fact".

When all is said and done, it seems likely that most lawyers in Alberta have, as an integral part of their practice, some aspect of service to the community which could properly be characterized as pro bono service. This is amply demonstrated by the effectiveness of organized programs beyond the ken of the private bar but which rely on the private bar for their success.

### **THE LEGAL AID SOCIETY OF ALBERTA**

The Legal Aid Society of Alberta is the major provider of legal services to the poor in the area of criminal matters. While in theory its mandate extends to the provision of services in all legal matters where the client qualifies financially, the level of funding provided to the Society by the provincial and federal governments has severely restricted its ability to fulfill that mandate. Since the federal portion of the funding is rela-

ble only to matters arising out of federal statutes, it necessarily follows that in order to maximize these benefits, the Society has to put particular emphasis in this area (in particular matters arising under the *Criminal Code of Canada*). Consequently, very little is provided in the way of assistance in civil matters, and of that which is, it more often than not also arises out of federal statutes such as the *Divorce Act* or now, the *Young Offenders Act*. While the inception of the *Charter of Rights and Freedoms* would appear to open new vistas for coverage under the Legal Aid Plan again, the matter will ultimately be determined by the level of funding available.

But there is another aspect of the Legal Aid Plan in Alberta which merits consideration. Specifically, the level of assistance provided in relation to the level of funding available. For there can be no doubt that this level of service could not be obtained from the funds available without the "pro bono" contribution of lawyers in Alberta. Legal Aid in Alberta is of the type known as "judicare". At its most basic, what this means is that all legal services provided under the plan, are provided by members of the private bar.<sup>16</sup>

These lawyers providing services under the plan are paid by the Society on the basis of a tariff set by the Society. It is here that the element of "pro bono" comes into play. For very clearly, the level of fees payable as set in the tariff is substantially below the level of fees that would be charged by these same lawyers, were they privately retained on the matter. This disparity in fees can only be rationalized by recognizing (at least in some sense) that there is a significant pro bono aspect to legal services provided under the plan.

Recognition of this pro bono aspect to services provided under the plan is widespread amongst lawyers.<sup>17</sup> Most lawyers who do work for Legal Aid, do so on the basis that they are fulfilling a part of their professional obligation to ensure access to the legal system to all. All will freely

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16 This is in contrast to other provinces in Canada, where Legal Aid staff lawyers provide the bulk of services, and the private bar is utilized only to supplement those services. There has been considerable debate within the profession concerning the relative merits of the various schemes operating in Canada today. This debate began long before the actual inception of Legal Aid in Canada, and has not abated since that time. In fact, given the experience of the 15 to 20 years that the various schemes have been in place in Canada, and given the present state of legal, social, and economic issues in Canada it has, if anything, attained new urgency.

17 But not, arguably, among the general public.

admit, that within the context of their general practice, the monies paid them under the Legal Aid Plan, go only so far as to meet their overhead costs. On the other hand, it should not be overlooked that those lawyers whose practice consists largely of representing clients on criminal matters, "make their living" off of Legal Aid. For these lawyers, the fees obtained from the Legal Aid Society meet not only their operation expenses, but indeed provide their basic minimum earnings; work done on private retainer comprises, as one such lawyer so candidly put it, the "gravy". Even so, acknowledgement must be made of the fact that the decision by a lawyer to devote the majority of his or her practice to files obtained from the Legal Aid Society, is implicitly a decision to devote the majority of his or her efforts to a practice comprising a very strong pro bono element. For unquestionably, the level of earnings generated by such a practice is not up to the level of earnings of a more general practice, and certainly nowhere near the level of a specialized practice (such as is found in the major firms in urban centres).<sup>18</sup>

In sum then, within the context of the provision of pro bono services in the province of Alberta, it can fairly be said that the most significant mechanism by which lawyers do make such a contribution, is through their services provided under the Legal Aid Plan.<sup>19</sup> It must be remembered however, that because of financial restrictions, the major portion of this contribution is limited to criminal matters. It therefore falls to other organizations to attempt to meet the need arising in civil matters.

In 1983, there were 19,434 applications for criminal Legal Aid (69% of all applications) and 69% of those (13,501) received certificates. Civil applications amounted to 8,578 (31% of all applications) and 44% of those were granted certificates (3,766). The demand for certificates is also increasing at a much greater pace than is the number of certificates granted.<sup>20</sup>

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18 It is not uncommon within the profession to view a practice based largely on Legal Aid work in opprobrious terms. The thinking behind this would seem to be that "this is the only kind of work that these lawyers can get". Implied in this, is the view that these lawyers are, in some respect, less able than their peers. What this implies about the equality of legal services provided to the poor, about the administration of the Legal Aid Plan, and about the profession as a whole, should be readily apparent. Irrespective of any particular instances cited in support, it is respectfully submitted that the holding of this view does the profession a deep disservice.

19 The one exception to this may be in the City of Calgary, as will be illustrated further on.

20 Legal Aid Society of Alberta, *Annual Report, 1983*. In recent conversation with the author, the Executive Director of the Legal Aid Society of Alberta indi-

## STUDENT PROGRAMS

There is a rich tradition of the provision of pro bono services by law students. The number of ways in which this is accomplished in Canada is undoubtedly as varied as the number of law schools that there are in Canada. In fact, even though there are only two Colleges of Law in the Province of Alberta, there are four student run programs presently in existence, and one other organization which evolved from a student run program.

### Student Legal Services

Student Legal Services (S.L.S.) operates out of the Faculty of Law, University of Alberta, in Edmonton, and was the forerunner of all other like programs in the province. In addition to the general services provided at the main clinic on campus, the students also provide services as delineated by both geography and topic. Student supervision is provided by one staff lawyer, and the clinics are operated on a year round basis with funding supplied by the Alberta Law Foundation. As the only formal organization existing to provide pro bono services in the Edmonton area, it is not surprising that the demand for service far exceeds the ability of the students at S.L.S. to provide it. Regretably, while comprehensive records of the activities undertaken are maintained, statistical data indicating the level of service provided and demand for service are not readily accessible.

### Student Legal Assistance

Student Legal Assistance (S.L.A.) is the program operated by the students out of the Faculty of Law at the University of Calgary. It operates on a year round basis, and in addition to its main operation at the law school, also operates a clinic in the Town of Banff in the summer months. Supervision of the student activities is handled by law professors and volunteer practitioners from the Calgary Bar. Funding is provided by the Alberta Law Foundation.

As is the case with the student program at the University of Alberta, the program at the University of Calgary includes keeping comprehensive records of the cases handled. But again, statistical evidence of the demand for services is not accessible. And while these services are

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cated that he had in his possession "a stack of computer printouts that high" (approximately 8 inches), which proves beyond any doubt that the legal needs of the poor are not being met by the presently existing mechanisms in Alberta. Unfortunately, the author was unable to access this information for inclusion in this report.

available to the general public (within fiscal guidelines of course) because of the location of the main offices at the Faculty of Law it is not surprising that the majority of clients come from the University community.

#### **Lethbridge Legal Guidance and St. Paul Legal Guidance**

Lethbridge Legal Guidance and St. Paul Legal Guidance are staffed and operated by law students in the summer months only. Clinical services are provided to the general public not only in Lethbridge and St. Paul, but also in the surrounding area. Supervision of the student activities is again provided by volunteer lawyers practicing in those localities, and there is in some circumstances follow-up by these volunteers. Funding for these programs is provided by the Alberta Law Foundation and again, for the purposes of this report, statistical data on the service provided is unavailable.<sup>21</sup>

#### **CALGARY LEGAL GUIDANCE**

Calgary Legal Guidance was, at its founding, a student program operated in the summer months by students who were attending the faculty of Law at the University of Alberta in Edmonton, but whose homes were in Calgary. From these student beginnings however, the organization has grown and evolved into an organization relying on the pro-bono efforts of practicing lawyers rather than law students. The level and range of services offered through its clinical and public legal education programs extend well beyond the range and level of services provided by any other voluntary organization of like nature in the common law world. This organization has thrived and grown over its fifteen year history not only because of the tremendous support of the Calgary Bar, but also because of the ongoing and very generous funding of the Alberta Law Foundation.

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21 It should be noted that the unavailability of statistics from student run programs is, in the writer's opinion, due in no small part to the very real fact that these organizations by their nature do not have the administrative structure necessary for the efficient and effective compilation of such statistics. This is exacerbated by the fact that the students are, not surprisingly, motivated to direct their energies mainly to client service, and yet further by the annual turn-over in participants in the programs. As an observation (but certainly not a criticism) it might be suggested that a fair portion of these students' administrative time is spent "re-inventing the wheel" - which may not be all that bad. Certainly, in addition to providing very practical experience in the administration of client service delivery, it also implicitly provides the mechanism for innovation.

Calgary Legal Guidance provides its clinical legal services to the public in a manner not unlike that adopted in many jurisdictions in the United States (and, although it is unlikely that those programs were based on that of Calgary Legal Guidance, it is nonetheless true that Calgary Legal Guidance was operating before any of them). Services are provided in a very straightforward and simple manner. Each evening from Monday through Thursday, volunteer lawyers attend at the clinic from roughly 7:00 p.m. to 9:30 p.m. to interview clients who have been pre-screened by the office staff. These clients are persons who cannot afford to pay for the services of a lawyer (as determined by applying the Legal Aid Plan financial guidelines), and who, because of the nature of their problem, do not qualify for assistance under the Legal Aid Plan of Alberta. The volunteer lawyers provide summary advice to the clients. This consists, in the main, of sorting out the legal problems the client is experiencing, and advising the client on the steps he or she needs to take in order to resolve those legal problems. In many cases the problem can be resolved by some minimal intervention by a lawyer (such as writing a letter, making a telephone call, or drafting a form); such follow-up is normally provided by the volunteer lawyers, and such activity on their part is encouraged.<sup>22</sup>

To enhance and supplement the services provided by the volunteers, Calgary Legal Guidance employs two staff counsel. These lawyers are members of the Law Society of Alberta, practicing under their own names, and receive payment for their services rendered only in the form of salary paid to them by Calgary Legal Guidance. Their main functions are as follows: first, to coordinate and review the activities of the volunteer lawyers; second, to attend at outlying day clinics and there provide summary advice to clients; third, to supervise the activities of law students

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22 It should be mentioned here that Calgary Legal Guidance has a very strict rule against lawyers attending the clinic in order to gain new clients. Thus, while follow-up services by volunteer lawyers are encouraged, these services must be provided at no cost to the client. Indeed, volunteer lawyers are expressly forbidden to provide the client with their full name and, should a client subsequently contact the office seeking the name of the lawyer he or she has seen for the purposes of retaining that lawyer, that information is not provided and the client is referred to Lawyer Referral.

If it comes to the attention of the Society that a lawyer has broken this rule, that lawyer is immediately struck from the volunteer roster. In the fifteen year history of the organization, that has, to the author's knowledge, happened on only three occasions. Such a record, it is respectfully submitted, is very strong evidence indeed of the high ethical standards and strong commitment to the ideals of pro-bono service possessed by the volunteer lawyers participating in this program.



employed by the Society in the summer months; and fourth, in matters of extreme need and in relation to the time they have available, to provide follow-up legal services to clients at no cost to the clients. This use of staff counsel has proven to be particularly effective in the delivery of pro-bono services and, it is submitted, is one of the fundamental reasons for the on-going success of this organization.

Calgary Legal Guidance is now entering its fifteenth year of service to the community. That makes it one of the first, and most long-lived and successful lawyer-operated pro bono programs—not just in Canada, but in all of North America. And as will be demonstrated by the statistical information which follows, it may in many respects be considered to be one of the most effective organizations operating for this purpose in North America.<sup>23</sup>

Over the last four years, Calgary Legal Guidance has had an average of 27,500 calls per year to the front switchboard. It is estimated that roughly 75% of those calls (20,625) are from persons seeking advice or assistance on a perceived legal matter. Of that number, an average of 8,600 (42%) have been referred to some other source for the resolution of their problem (such as Lawyer Referral of Legal Aid); a further 7,465 (an average of 36%) have a query which can be simply answered at the time (e.g.: What happens if I don't pay my traffic ticket?) or a non-legal problem (e.g.: Where is Provincial Court?); the remaining 4,500 (an average of 22% over the four years) have received summary advice from a volunteer lawyer at one of the clinics. Put another way, in the four year period from January 1, 1981, to December 31, 1984, Calgary Legal Guidance received close to 110,000 phone calls of which roughly 83,000 calls were from persons requiring assistance with a perceived legal problem; of that number, close to 35,000 persons received referral to some other source for assistance in the resolution of that problem, and a further 18,000 received summary advice from a volunteer lawyer at a Calgary Legal Guidance clinic.<sup>24</sup>

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23 The writer has made every effort to eliminate personal bias and apply a purely objective analysis to the examination of this area. There may well be other organizations in existence which match or exceed the record of Calgary Legal Guidance; but if so, the extensive research conducted for this report has not revealed their existence. Quite frankly, the writer entered into this project with no preconceptions as to the status of Calgary Legal Guidance in relation to other pro bono mechanisms that have existed or are presently in existence. But as the research progressed, it became more and more and more obvious that this organization is something very special and unique indeed. The plain fact is, there just does not appear to be any other organization, anywhere in North America, which has a record of achievement to match that of Calgary Legal Guidance.

24 In addition to this, there were some 96,000 calls to the Dial-A-Law service op-

It must be remembered that persons receiving assistance from Calgary Legal Guidance are persons who cannot afford the services of a lawyer and do not qualify under the Legal Aid Plan of Alberta. Regardless of the pro bono mechanism, these are persons who would (presumably) qualify for assistance. By utilizing the statistics of the Legal Aid Society of Alberta, it is possible to extrapolate that close to 14,000 persons a year in the province as a whole would qualify for, and benefit from a pro bono program such as Calgary Legal Guidance offers.<sup>25</sup>

Furthermore, since the level of service provided by Calgary Legal Guidance is limited to its resources and, since it seems reasonable to assume that not all persons who could conceivably benefit from the services of the organization actually take advantage of those services, it necessarily follows that any error in this measure of the need for pro bono is an error on the conservative side. That is, the need for pro bono assistance is very likely far greater than that indicated here.

In the final analysis, it may well be that the best proof of the need for a pro bono mechanism in Alberta, lies in the ongoing experience of Calgary Legal Guidance. There is certainly no reason to suppose that the needs of the public in this area would be markedly different in Calgary than elsewhere in the Province. The organization has never had to pare its volunteer roster because of lack of clients; but it certainly does have to limit the number of clients that can be booked for any particular clinic based on the availability of lawyers to see those clients. In other words, there is and continues to be a far greater demand for service than there is ability on the part of the organization to provide that service.

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erated by Calgary Legal Guidance over this same four year period. 85% of all callers to Dial-A-Law listen to at least 1 tape to obtain legal information. While this can in no way be construed as a demonstration of the need for pro bono, it certainly does help demonstrate the degree of activity of the organization. In excess of 50,000 calls a year should not be taken lightly.

25 Legal Aid Society of Alberta, *Annual Report*, 1983. The method of extrapolation is as follows: over the course of 1982 and 1983, the Calgary office of the Legal Aid Society of Alberta received 32.5% of all applications in the province; if that can be taken to indicate the proportion of need in Calgary relative to the Province as a whole, and if the average number of clients seen in a year by Calgary Legal Guidance can be assumed to reflect that proportion; then the division of 4,500 clients per year by .325 yields a figure of 13,846 clients per year for the province as a whole. Admittedly, this method of extrapolation is somewhat less than strictly scientific. This is particularly so in light of the earlier remarks concerning the accuracy of the Legal Aid statistics as a measure of public need for legal assistance. Given the dearth of information available however, it does provide at least an indication of the level of need in the Province.

## CONCLUSION

Is this evidence sufficient to prove that there is a need for some sort of pro bono mechanism in Alberta? It clearly does show that every year there are many, many people who incur legal problems, but who cannot afford to retain a lawyer to represent them in the resolution of those problems. It also shows that, particularly in respect to civil matters, the rules of the Legal Aid Plan in Alberta preclude assistance for many of these people (it should be noted in this context, that 75% of the clients seen at Calgary Legal Guidance, are seen on civil matters). If then, there is to be no change in the delivery of service under the Legal Aid Plan of Alberta,<sup>26</sup> there can be little doubt that a systemized pro bono scheme would be of tremendous value.

## III. RECOMMENDATIONS

### INTRODUCTION

There are very few formal pro bono programs operated by the profession in Canada,<sup>27</sup> although there are a number of student programs which have a pro bono component to them. In the United States however, there are a tremendous number of programs at the state, county, and municipal level. There are also a number of programs which are directed at special interest groups (e.g. the elderly). The types of methods of delivery of services and structures of these programs varies almost as much as the actual numbers of programs themselves. Indeed there is such variety, that

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26 The role of Legal Aid in Alberta, its scope, and its function, are matters that have been hotly debated within the profession and government since before its inception. This debate continues at the present time. Although these are matters which impact dramatically on the substance of this report, the writer does not consider this to be the proper forum within which to enter this debate. It is the writer's opinion however, that were all the recommendations which are contained in the Report of the Joint Committee (Purvis, Faulkner, et. al., *Report and Recommendations of the Joint Committee of the Legal Aid Society of Alberta on the Future Development of the Alberta Legal Aid Programme* (Edmonton: Legal Aid Society of Alberta, 1975) in effect at this time, then there would be little need for any sort of formalized pro bono mechanism.

27 In fact, to the writer's knowledge, there are only two. The Legal Services Commission of British Columbia does maintain a roster of volunteer lawyers who will, from time to time, undertake pro bono activities on behalf of clients in particular need who do not qualify under the BC Plan. The other program is that of Calgary Legal Guidance, which has already been discussed.

to list each and give a very brief description of its operation, would increase the size of this report fourfold. Nonetheless, this U.S. experience has shown that there are a number of features shared by all successful programs. These are what might be called the "prerequisites" to every pro bono program.

No program has any chance of success without the dedicated support of at least some segment of the profession. The larger or more comprehensive the program, the greater the support that is needed. Active commitment to the pro bono program (rather than passive acceptance) from senior and influential members of the profession is of incomparable value.

This commitment need not take the form of approaching the matter with "missionary fervor"; but it must entail a belief in the goals and ideals of a pro bono program, and the encouragement of activities which will help to meet those objectives.

There must be some sort of formal mechanism which brings together clients needing pro bono services, and the lawyers who will provide those services. This is sometimes referred to in the literature as a legal "broker". Experience has shown that the most effective method of providing this "brokerage" service, is by including it as an integral part of the pro bono program as a whole.

There must be coordination, supervision, and follow-up of the activities conducted within the program. In other words, the program must be systematically directed. Without this there is no program--only, at best, good intentions. This systemization is required to not only coordinate the activities of the lawyers in the program, but also to "track" the cases to ensure that the clients are receiving the appropriate service. It can also serve to streamline legal activities by prescreening the clients.

All structured pro bono mechanisms will have a fiscal side to them. The two elements of the fiscal aspect of pro bono activity are of course, the actual money required to mount the program and the services donated by lawyers. If these services were not provided, they would have to be paid for; and their provision, while not a direct cost to the program, certainly does represent a cost, whether direct or indirect, to the lawyer participating. The more extensive or comprehensive the program, the greater the direct cost will be, and the greater the need for donated services will be.

Finally, there must be a sensitivity to the needs in the community. This means that not only must the needs of those persons who could probably benefit from such a program be taken into account, but also consideration

must be given to the demographics of the community, the activities of other community agencies and organizations, and the needs of the profession within the community. What works in New York City, may not be appropriate for Alberta; what works in Calgary, may not be appropriate for Peace River. In fact, the choice of an inappropriate program will not only doom that program to failure, but could well jeopardize future pro bono initiatives.

### THREE TYPES OF PRO BONO PROGRAMS

#### A. In-House Department

A number of large firms in the U.S. have made the decision to mount a pro bono initiative of their own. Their way of doing this has been to set up a department within the firm to provide these services. This department would function just like any other department within the firm; for example the real estate department, the litigation department, or the criminal department. This department can be located either in the firm offices, or as a "branch" office, which would usually be located in a deprived area of the community. Juniors and associates in the firm circulate through this department, with each lawyer spending anywhere from six months to two years on assignment in the department. The full resources of the firm are available to the pro bono department, just as they would be to any other department.

Experience has shown that, in order for such an undertaking to have any chance of success at all, it must be managed by a senior partner who is committed to the notion of pro bono. Naturally, the activities in such a pro bono department are financed by the activities of the other departments within the firm; which is to say, that paying clients are subsidizing the pro bono activities.

On the whole, this model of pro bono delivery of services has met with "limited" success--at least, within the context of meeting needs in the community. For while it may meet the need of the lawyers participating to feel that they are doing something worthwhile in the way of pro bono activity, it remains somewhat inaccessible to the very client community to which its efforts are directed. Since it lacks the brokerage element, it is up to these potential clients to seek out this assistance. And the bald fact remains, that persons who are unable to afford the services of a lawyer are not likely to seek assistance at the largest and most prestigious firms in the community, even though they have been informed that they can receive pro bono service there. Of course, there are other problems

associated with this model as well. For instance, the management of most large firms treats each individual department as a profit center. Each profit center is, in a sense, in competition with every other profit center for the allocation of firm resources (both legal and support) and, the "success" of each department in this competition is largely determined by its profitability. Needless to say, a pro bono department doesn't stand much of a chance.

The end result, no matter how laudable the original intentions, is that these type of programs most often end up appearing to be "public relations" exercises on the part of these large firms. As such, from a purely cost/benefit point of view, their worth is at best questionable. And the effect on the firm's reputation can in fact be negative, if the activity comes to be viewed by a cynical public as simply a public relations gimmick.

### **B. Yearly Donated Hours**

Perhaps the most common type of pro bono program currently operating in the United States, is that where lawyers of firms pledge to donate a certain number of their working hours per year on pro bono matters. A variation on this is for those lawyers who do not donate time for pro bono service, to donate the equivalent in fees to help pay for the administration of this program. The amount of time (or money) is usually determined as a percentage of total billable hours in a year. This ranges from a low of 2%, to high of 10%, with the mean being 5% of billable hours. Since studies have shown that the billable hours of lawyers ranges anywhere from 1,000 to 2,000 hours a year, this means that the actual hours spent on pro bono can range from a low of 20 to a high of 200 hours per year.<sup>28</sup>

The "bringing together of clients and lawyers" in such a program, can range from the use of existing community resources (such as Lawyer Referral, or Legal Aid) to a formalized administration which has this role (among others). Since the coordination and monitoring of lawyers' activities is particularly critical with this type of model, the latter system has proven to be the most effective. In many instances, staff counsel are utilized to provide this service, and to enhance and support the activi-

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28 The model being discussed here, is one where the lawyer takes on a case from initiation to completion. While the number of hours spent on any individual case will vary enormously, the experience in the state of California is that the mean number of hours on a pro bono file is 10 hours. Thus the level of service provided under this program, can be considered to range from a low of 2 files per year per lawyer, to high of 20 files per year per lawyer.

ties of the volunteer lawyers.

The drawbacks to this type of model are as follows: In the large firms, the juniors usually end up providing a disproportionate amount of hours on pro bono activity, in relation to the activities of the seniors; there is a natural tendency to give priority to the work required by paying clients and as a consequence, the services needed by the pro bono client suffer; and of course, even with a formalized administrative structure, it is particularly difficult to monitor the activities of the participating lawyers, both in terms of hours of service provided, and quality of service provided. Additionally, this is a model to which larger firms are better suited than small firms.

As a result, it too can end up looking like a public relations gimmick, to the possible detriment of not only those firms, but the profession as a whole.

### C. Legal Advice Clinic

In this type of model, volunteer lawyers provide summary advice to clients, with follow-up in some circumstances being provided by either those volunteers or staff counsel. Probably the best example of this type of program, as directed to the general public, is Calgary Legal Guidance. Depending upon the scope of the operation, the administration can range from the fairly simple to the fairly complex.

The advantage to this type of model is that the structuring of it will normally include enough administration to look after the problems of "brokerage", coordination, and monitoring of activities. As well, it requires far fewer hours from the volunteer lawyers. The main disadvantage to this model, is that most clients do not receive legal representation in the resolution of their problem. And even in those instances where there are staff counsel to provide representation in extreme cases, lack of resources precludes any "major" undertakings (such as taking an important constitutional issue to the Supreme Court). Nevertheless, the evidence does seem to suggest that on the whole, this model is the most adaptable to varying circumstances and, in purely utilitarian terms, seems to provide the greatest benefit at the least cost.

### RECOMMENDATIONS

As will be appreciated by this point, the recommendation of a particular type of pro bono model as being best suited to meeting the needs of the citizens of Alberta, is considered to be inappropriate. That is to say that,

beyond the very successful example provided by Calgary Legal Guidance, there are at this point, too many "unknowns" to justify the choice of any one model over that of another. But this does not mean that the whole idea should be abandoned. On the contrary, it is hoped that the information and opinions contained herein, will provide the impetus for research into and debate on the provision of, not only pro bono services, but the whole question of access to justice in Alberta. To this end, it is recommended that the Law Society of Alberta strike a special committee whose task it will be to further investigate this matter, and corollary matters, and to report back to the Society with recommendations in respect thereof.

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